

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

IN RE: PHARMACEUTICAL INDUSTRY)	MDL NO. 1456
AVERAGE WHOLESALE PRICE)	
LITIGATION)	CIVIL ACTION: 01-CV-12257-PBS
)	Subcategory Docket: 06-11337-PBS
)	
THIS DOCUMENT RELATES TO)	Judge Patti B. Saris
)	
<i>U.S. ex rel. Ven-A-Care of the Florida Keys,</i>)	Magistrate Judge Marianne B. Bowler
<i>Inc. v. Abbott Laboratories, Inc., No. 07-CV-</i>)	
<i>11618-PBS; U.S. ex rel. Ven-A-Care of the</i>)	
<i>Florida Keys, Inc. v. Dey, Inc. et al., No. 05-</i>)	
<i>11084-PBS; U.S. ex rel. Ven-a-Care of the</i>)	
<i>Florida Keys, Inc., et al. v. Boehringer</i>)	
<i>Ingelheim Corp., et al., No. 07-10248-PBS</i>)	

**DEFENDANTS' ABBOTT LABORATORIES, INC., DEY, INC., AND THE ROXANE
DEFENDANTS' JOINT MOTION FOR APPOINTMENT OF A SPECIAL MASTER**

On November 5, 2008, the Court issued its ruling on the twelve alleged “deliberative process” documents the Government submitted for *in camera* review on September 15, 2008. Noting the importance of conducting an individualized review of the evidence in conducting the balancing test, the Court ordered that eight documents be produced—including all or portions of four documents that were not covered by the privilege at all. (Dkt. No. 5665.)

The Court’s review confirms that the Government has been overly aggressive in its assertion of the deliberative process privilege, shielding documents which are neither pre-decisional nor deliberative and documents the Court has found important to Defendants’ needs. There is strong evidence which demonstrates that the Government is in possession of more documents that are both responsive the Court’s recent instructions to the Government and highly relevant to this litigation which were not submitted for *in camera* review. As such, only a considerably more thorough review of the Government’s allegedly privileged documents will serve the ends of justice here.

Accordingly, Defendants Abbott Laboratories, Inc., Dey, Inc., and the Roxane Defendants respectfully request, pursuant to Rule 53, that the Court appoint a special master to review up to 500 documents that the Government has withheld under the deliberative process privilege (out of the 2000 documents appearing on the Government's privilege logs). In the alternative, Defendants request that the Court expand its own *in camera* review to include approximately 200 documents that the evidence shows to be plainly relevant to the Government's knowledge and response to so-called "mega-spreads" for the products at issue. Those documents are listed on the Schedule 1 attached to the supporting memorandum.

A memorandum in support of Defendants' request is filed contemporaneously with this motion.

Dated: November 11, 2008

Respectfully submitted,

/s/ James R. Daly

James R. Daly

Eric P. Berlin

Brian J. Murray

JONES DAY

77 West Wacker Drive, Suite 3500

Chicago, Illinois 60601

Telephone: (312) 782-3939

Facsimile: (312) 782-8585

R. Christopher Cook

David S. Torborg

JONES DAY

51 Louisiana Avenue, N.W.

Washington, D.C. 20001-2113

Telephone: (202) 879-3939

Facsimile: (202) 626-1700

Counsel for Defendant Abbott Laboratories, Inc.

/s/ Eric T. Gortner
Helen E. Witt, P.C.
Anne M. Sidrys, P.C.
Eric T. Gortner
John W. Reale (BBO # 654645)
KIRKLAND & ELLIS LLP
200 East Randolph Drive
Telephone: (312) 861-2000
Facsimile: (312) 861-2200

Counsel for Defendants Boehringer Ingelheim Corp., Boehringer Ingelheim Pharmaceuticals, Inc., Boehringer Ingelheim Roxane, Inc., and Roxane Laboratories, Inc.

/s/ Neil Merkl
Paul F. Doyle (BBO # 133460)
Sarah L. Reid
Neil Merkl
KELLEY DRYE & WARREN LLP
101 Park Avenue
New York, NY 10178
Telephone: (212) 808-7800
Facsimile: (212) 808-7897

Counsel for Defendants Dey, Inc., Dey L.P, Inc. and Dey, L.P.

CERTIFICATE OF SERVICE

I, David S. Torborg, an attorney, hereby certify that I caused a true and correct copy of the foregoing to be served on all counsel of record electronically by causing same to be posted via LexisNexis, this 11th day of November 2008.

/s/ David S. Torborg_____

CERTIFICATE PURSUANT TO LOCAL RULE 7.1

I certify that the moving party communicated with counsel for the Government in an effort to resolve the dispute referred to in this motion, and that the parties have not been able to reach agreement with respect thereto.

/s/ David S. Torborg
David S. Torborg